IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-835

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK TELEPHONE COMPANY

REPLY OF THE RESPONDENT TO THE PETITION OF THE SOLICITOR GENERAL ON BEHALF OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

For the reasons stated herein, Respondent New York Telephone Company believes the petition of the Solicitor General should be granted.

Respondent agrees that there is a conflict between the opinion of the Second Circuit below and that of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809 (1976), cited by the Government. In addition, on December 9, 1976, the Eighth Circuit (Judge Lay dissenting) also reached a contrary result from that of the Second Circuit in *United States* v. *Southwestern Bell Tel. Co.*, No. 76-1725. In the opinion of Respondent, a conflict also

exists between the opinions of the Seventh and Eighth Circuits and that of the Ninth Circuit in *Application of the United States*, 427 F.2d 639 (1970). Furthermore, there has been a wide difference of opinion among the individual judges who have considered the matter, as evidenced by the dissents in both the Second and Eighth Circuits, the conflicting views of the District Judges presented with the problem (see e.g., *In the Matter of the Application of United States of America for an Order Authorizing Use of a Pen Register Device*, 407 F.Supp. 398 (W.D. Mo., 1976)), and the different bases used by those judges who would sustain the Government's position.

In addition to the need to resolve this conflict, grant of the petition is warranted by the important public issues involved, which this Court should address. The sweeping and yet essentially undefined nature of the asserted power to order the Telephone Company to affirmatively assist in the ordered surveillance, and its implications for all citizens, make it a matter which justifies the exercise of this Court's supervisory powers, just as the Second Circuit felt it should exercise its comparable powers with respect to the courts within its jurisdiction. These cases also involve the fundamental question of whether the district courts have the authority to authorize the use of a pen register, with its inherent full wiretap capability•, outside of the Congressionally-mandated safeguards of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510, *et seq.*) (hereinafter referred to as Title III). In this respect, the question as formulated by the Solicitor General is too narrow and somewhat inaccurately drawn. The orders of the District Courts are not "admittedly valid." In the Court below, Respondent contended that "It is doubtful that the District Court has the authority to issue an order authorizing law enforcement to utilize a pen register except pursuant to the provisions of Title III." The Court below addressed this issue (as did the Seventh and Eighth

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• See footnote p. 5, *infra*.

Circuits) and found a district court has this authority. However, such authority was questioned by Judge Lay in his dissenting opinion in the Eighth Circuit case, *United States* v. *Southwestern Bell Tel. Co., supra,* and was denied by Judge Oliver of the Western District of Missouri in *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, supra.*

Congress and the courts have wrestled for decades with the problem of balancing the need to protect the privacy of communications with the need for effective law enforcement. In 1968 Congress passed a comprehensive act in an attempt to strike a satisfactory balance. The Government, if it had chosen to do so, could have obtained authorization for the installation of the pen register at issue pursuant to the provisions of Title III of that Act (C.A. App. 12). It stretches credibility to believe that Congress, in enacting the elaborate safeguards of Title III, intended to allow the Government to proceed as here with the inherent capability for abuse thus entailed. The question of the power or propriety of the issuance of the order to the Telephone Company does not arise without sanctioning, at least implicitly, the authorization of pen register surveillance outside Title III, and this Court should not do so without full consideration.

For the reasons set forth above, Respondent, while agreeing to the Solicitor General's statement of "Opinions Below" and "Jurisdiction" believes that the "Question Presented," "Statute[s] and Rule[s] Involved" and "Statement" should be expanded and clarified.

Question Presented

Whether a United States District Court has the authority, when the requirements of Title III have not been complied with, (1) to authorize the installation of a pen register for the surveillance of a telephone line by law enforcement officials, and (2) to order a telephone company to provide affirmative assistance in carrying out such surveillance.

Statutes and Rules Involved

The All Writs Act, 28 U.S.C. 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 57(b), Federal Rules of Criminal Procedure, provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Rule 41, Fed. R. Crim. P.

> (b) Grounds for Issuance. A warrant may be issued under this title to search for and seize any property
>
> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

18 U.S.C. 2510, *et seq.*

Because of its length, Title III is attached hereto as an Appendix.

Statement

On March 19, 1976, an Order was issued by the United States District Court (S.D.N.Y.), Tenney, J., directing Respondent and its employees to furnish information, facili-

ties and technical assistance to Federal law-enforcement officials in connection with the installation and operation of a pen register.* The Order was not issued pursuant to the provisions of Title III.

Respondent declined to furnish lease lines or technical assistance pending further judicial consideration since Respondent questioned the legal authority of the District Court to issue said order outside of the provisions of Title III. On March 30, 1976, Respondent filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 order. The district court denied Respondent's motion and Respondent immediately appealed to the Circuit Court of Appeals for the Second Circuit. That court refused to vacate the district court's order, but authorized an appeal on an expedited basis.

The Court of Appeals reversed that portion of the district court's order directing Respondent to provide facili-

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* The Solicitor General as Footnote 1 on page 3 of his petition quotes a description of a pen register from the majority opinion of Judge Medina in the court below. This quote, while accurate as far as it goes, does not describe the full capabilities of a modern pen register. As the Court of Appeals for the Fifth Circuit pointed out after a similar description of a pen register:

> "Notwithstanding the apparent sterility of a pen register implied by this definition, the expert testimony below indicated that once a pen register has been installed, a full wiretap 'interception' of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit. In *Re Joyce*, 506 F.2d 373 at 377 (1975)."

To the same effect is Judge Lay's statement in his dissenting opinion in *United States* v. *Southwestern Bell Telephone Co.* (8th Cir.) No. 76-1725:

> "It is conceded by the parties that such surveillance [pen register] can be abused and that private conversations on touch-tone telephones can be intercepted." p. 17.

The affidavit of F. Natoli in the District Court in this case affirms that, once the lines are provided for the installation of a pen register, the Government possesses "full capability of wiretapping." (C.A. App. 13)

ties and technical assistance. In its opinion, the court first addressed the issue of whether the district court had authority to authorize surveillance of a telephone line through the use of a pen register, outside of the statutory provisions of Title III. The court found that the district court had such authority, agreeing with the rationale of *United States* v. *Illinois Bell Tel. Co., supra,* that the authority to issue such an order outside of Title III could be found either in the inherent power of the district court or by analogy to Rule 41 F.R. Cr. P. In so doing, however, the court recognized that Rule 41 was not directly applicable:

> "While the electronic impulses recorded by pen registers are not 'property' in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of nontangible property. But see In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, 407 F.Supp. 398 (W.D. Mo. 1976)."* (P. App. 7-8a)

The Court next addressed the issue of whether the district court could properly order Respondent to provide technical assistance and facilities to federal law enforcement agents in placing and operating a pen register outside of the provisions of Title III. The Court stated:

> "This question is of some significance not only because of its immediate impact on the Telephone Company, but also because of its broader implications regarding

* In the cited case, the Federal District Court for the Western District of Missouri held, contrary to the majority's decision here, that Rule 41 was clearly not applicable and that a district court had no inherent authority outside of the provisions of Title III to authorize federal authorities to use a pen register. As stated previously, such authority was also questioned by Judge Lay, dissenting, in *United States* v. *Southwestern Bell Tel. Co., supra.*

> the power of a federal court to mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction." (*id.* p. 9a.)

It held that:

> ". . . in the absence of specific and properly limited congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." (*id.* p. 13a.)

The Court agreed with the statement of the Ninth Circuit in *Application of the United States,* 427 F.2d 639 (1970) that:

> "If the government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress." *Application of the United States, supra* at 644.*

The majority expressly rejected the reasoning of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co., supra,* that the quick action of Congress in amending Title III after the Ninth Circuit decision in *Application of the United States, supra,* indicated an assumption by Congress that district courts inherently had the power to require affirmative assistance:

> "On the contrary, we think it is just as reasonable, if not more reasonable, to infer that the prompt action by

* In this case, decided prior to the 1970 amendments to Title III (18 U.S.C. §§ 2511, 2518 and 2520) expressly authorizing a district court to require the assistance of third parties in carrying out a Title III wiretap order, the government had urged that a district court had inherent authority to require a telephone company to provide such assistance in placing a Title III order. The Ninth Circuit rejected that argument holding that, absent express statutory authorization, a Federal District Court was without power to compel technical cooperation by a Telephone Company in the interception of wire communications.

the Congress was due to a doubt that the courts possessed inherent power to issue such orders, or that courts would be unwilling to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. In any case, as Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authorizations should be required in connection with pen register orders, especially as the two are so often issued in tandem." (P. App. p. 15a.)

The Court then went on to express its concern that a finding of inherent authority in a district court to order such affirmative assistance, without any concrete statutory guidelines, was dangerous to the rights of private third parties who might be directed to aid the government in its law enforcement endeavors. The Court stated:

> "Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step." (*id.* p. 15a.)

Realizing the potential danger inherent in holding that a district court can direct third parties to affirmatively assist law enforcement without any statutory basis or guidelines and mindful of the dangerous precedent for future orders

directed to third parties, the Court refused to "take the first step" and hold that the district court had either inherent authority or authority under the All Writs Act to compel Respondent's affirmative assistance in this case.

Reasons for Granting the Writ

I

As set forth in the Preliminary Statement, Respondent concurs that the petition of the Solicitor General should be granted. It does so because of the contrary holdings between courts of appeals for four circuits on the important issue of whether a district court has the inherent authority, without express statutory authorization, to order an unwilling private citizen to assist Government agents in placing a pen register for the surveillance of the telephone lines of potential criminal suspects. The court below and the Ninth Circuit* have respectively held that a district court has no such authority without express Congressional authorization. Respondent believes these decisions are correct and that the Seventh and Eighth Circuits clearly have erred, and established a dangerous precedent, through their respective contrary decisions.**

It is clear that if a district court has this inherent authority to compel Respondent to affirmatively assist law enforcement, it would also have the same authority over other private persons as well. This was so recognized by the court below and by the strong dissent of Judge Lay in *United States* v. *Southwestern Bell Telephone Company, supra.* As Judge Lay stated:

> "The majority's rationale is surely dangerous precedent. Judicial authority to compel a private party to

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* *Application of United States, supra.*

** *United States* v. *Illinois Bell Tel. Co., supra; United States* v. *Southwestern Bell Tel. Co., supra.* (Judge Lay dissenting.)

assist the Government in the invidious act of electronic surveillance should be based on definite authority." p. 16.

There is no warrant for making any distinction between a telephone company and other private parties. When Congress amended Title III to provide for orders of assistance to law enforcement agencies, following the Ninth Circuit opinion referred to above, it provided that such order could be directed to "a communication common carrier, landlord, custodian or other person" (18 U.S.C. § 2518(4)). Common carriers are to be treated no differently than other citizens except insofar as valid statutes prescribe otherwise.

There even appears to be a difference between the Seventh and Eighth Circuits as to the source of this unprecedented claim of authority over a private party. The Seventh Circuit relies on the All Writs Act to supply the necessary authority. The Eighth Circuit, while mentioning the All Writs Act in a footnote, relies instead on the "inherent" authority of a district court. In both cases, the rationale is defective.

As Judge Lay aptly points out with respect to the All Writs Act:

> "It is axiomatic that the All Writs Act does not provide an independent federal jurisdictional base, but can only be used in aid of the court's jurisdiction." p. 11.

The language quoted from Judge Lay's opinion has consistently been the holding of those courts which have ruled on this issue. *United States* v. *First Fed. S. & L. Ass'n*, 248 F.2d 804, 808-09 (7th Cir. 1957), cert. denied, 355 U.S. 957 (1958); *Brittingham* v. *United States Commissioner of Internal Revenue*, 451 F.2d 315 (5th Cir. 1971).

The fact that the use of the All Writs Act is unprecedented under these circumstances was also recognized by Judge Mansfield in his dissent below:

> "It is true that, until the recent decision of the Seventh Circuit in *United States* v. *Illinois Bell Telephone Co.*, *supra*, the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant." (P. App. p. 19a)

The Eighth Circuit's claim of "inherent authority" to require the affirmative assistance of a third party is also unprecedented. The Ninth Circuit in *Application of the United States, supra*, expressly rejected this claim of inherent authority:

> "We are not convinced that the authority which the Government would have the court exercise to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy, from the power law enforcement officers may have to assemble a *posse comitatus* to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory or inherent, for entry of such an order." (427 F.2d at p. 644.)

As the court below found, the subsequent action of Congress in passing the 1970 amendments to the All Writs Act did not overrule, but acted upon, the holding of the Ninth Circuit quoted above (P. App., p. 15a). Also denying any "inherent power" is Judge Oliver's opinion in *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, supra,* and Judge Lay's dissenting opinion in *United States* v. *Southwestern Bell Tel. Co., supra.* With respect to this basis for claiming authority, Judge Lay said:

> "To me it is wrong that the judicial branch of government can thwart congressional intent and purpose by

conjuring up some convenient, mystical authority through the pseudonym of 'inherent power.'" p. 17.

Given the split in the holding and rationale of the Circuits, as well as the importance of the issue involved, Respondent believes that *certiorari* should be granted.

II

In reaching the issue of a district court's authority to direct affirmative assistance on the part of an unwilling third party in placing a pen register, the court below and the Seventh and Eighth Circuits first had to conclude that a district court had the authority to authorize the use of a pen register outside of the statutory safeguards contained in Title III. While each of these courts decided that a district court did have such authority, it is not clear that they did so on a consistent rationale and in the Eighth Circuit the conclusion was reached over the strong dissent of Judge Lay.

This aspect of the case, as well as the ultimate issue of a district court's authority to order affirmative assistance from third parties, currently is pending before the Sixth Circuit.* Southwestern Bell in the Eighth Circuit on December 23 petitioned for rehearing *en banc*.

Furthermore, the District Court for the Western District of Missouri held that a district court has no authority outside of the provisions of Title III to authorize the use of a pen register, a decision which the Government did not

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* In the *Matter of the Application of Ohio Bell Telephone Company*, No. USDJ 26 N.D. Ohio, not yet docketed. A Fifth Circuit case referred to in footnote 7 of the Solicitor General's Petition, *In Re Application*, No. 76-4117 has been mooted by mutual consent. However, in *Southern Bell Tel. Co.* v. *United States*, Nos. 74-3357, 74-3358 (1976), the Fifth Circuit, in holding that two earlier cases involving the same issues presented here were moot, directed that any future case be referred immediately to it for decision. Thus, it is highly probable that the Fifth Circuit will be presented with the identical issues in the near future.

appeal. See *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, supra.*

The grant of the basic authority to use a pen register for law enforcement outside the constraints of Title III is not "admittedly valid," and the question of the power or propriety of the issuance of the Order to the telephone company does not arise without sanctioning, at least implicitly, the authorization of pen register surveillance outside Title III, something this Court has never done.

As the Fifth Circuit found in the case of *In Re Joyce, supra*, once a modern pen register has been installed, wiretap interception of telephone conversations may be accomplished simply by plugging in headphones or a tape recorder to the appropriate terminal on the pen register unit. If a district court may authorize the use of a pen register, with its inherent capacity for wiretapping, simply by satisfying a nebulous Fourth Amendment requirement, then, as the District Court for the Western District of Missouri stated, district courts would:

> ". . . have power and jurisdiction to authorize the use of pen register devices in connection with *any* investigation of *any* violation of the laws of the United States, regardless of the fact that the Congress may not have included the particular offense within the coverage of Title III." (407 F. Supp. 398 (1976) p. 403.)

Logically, if a federal district court has this authority outside of the statutory safeguards contained in Title III, so does any state court, whether or not the particular state has enacted the enabling state wiretap legislation contemplated by Title III. Respondent respectfully submits that a review of the state of the law prior to the enactment of Title III, and Congress's stated intent in enacting Title III, clearly lead to the conclusion that Congress never intended to authorize the use of pen registers by law enforcement, with their inherent capability of abuse, outside of the stringent statutory safeguards contained in Title III.

On the other hand, the Government has a clear and satisfactory remedy. It is not stymied. An order authorizing the use of a pen register may be obtained pursuant to the provisions of Title III. Indeed the Government has done so on numerous occasions. See, e.g., *United States* v. *Finn*, 502 F.2d 938 (7th Cir. 1974), *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974), *United States* v. *Falcone*, 505 F.2d 478 (3rd Cir. 1974), cert. denied 420 U.S. 955 (1975).*

It also is clear that prior to the enactment of Title III, § 605 of the Communications Act of 1934 (47 U.S.C. 605), which prohibited all interception of telephone conversations by law enforcemnt officers, also prohibited the use of a pen register, since such use would reveal the existence of a telephone call. See *Benanti* v. *United States*, 355 U.S. 96, 2 L.Ed. 2nd 126 (1957). As the court stated in *United States* v. *Guglielmo*, 245 F. Supp. 534 (1965):

> "It is obvious from the facts that the instant unconsented use of a pen register violated the integrity of telephone communications and the clear prohibition of § 605 . . . *Nardone* v. *U.S.*, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307." p. 536.

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* In this connection, the argument of the Government on page 11 of the petition is quite revealing. It objects to the "added procedural burdens on the government and the courts in complying with the complex requirements of Title III." But those "complex requirements" were imposed by Congress to make certain that a proper balance was maintained between the rights of private citizens to be free from unnecessarily broad and frequent invasions of their privacy and the legitimate needs of law enforcement. The Government—and this is the nub of the matter—should not be permitted to do an "end run" around Title III. The additional argument made by the Government (p. 11) that if pen registers are not authorized it will be forced to secure authority for broader invasions of privacy (i.e., wiretaps) is, of course, a *non sequitur*. The law enforcement agency need only apply for the authority to install a pen register if that is all it requires, and the Attorney General or his designated assistant need only authorize such if, in their judgment, no broader invasion of privacy is warranted.

This also was the holding of *U.S.* v. *Caplan*, 255 F.Supp. 805 (1966) and *U.S.* v. *Dote*, 371 F.2d 176 (7th Cir. 1966). Thus, prior to the enactment of Title III in 1968, the use of a pen register by law enforcement officials was prohibited by § 605 on the ground that it was an "interception which revealed the existence of a telephone call."

In enacting Title III, the Congreess set forth its intent as follows:

> "(b) In order to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.
>
> "(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication had consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused." (§ 801)

Congress, in enacting Title III, obviously intended to legislate comprehensively and preemptively in the area of "the interception of wire and oral communications." As set forth above, prior to the enactment of Title III, the use of a pen register was considered the *interception* of a telephone conversation. This court in *United States* v. *Gior-*

dano, 416 U.S. 505 (1974) interpreted Congress's intent as follows:

> "The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorized wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." (416 U.S., p. 515)

Thus Congress's intent, as expressed in the Congressional findings and as interpreted by this court, is to have Title III govern all interceptions of telephone conversations. This expressed intent, coupled with the fact that the use of a pen register was regarded by the courts as an "interception" prior to the enactment of Title III, makes it difficult to believe that Congress intended to authorize law enforcement to use pen registers, with their inherent capabilities for wiretapping, except pursuant to, or in conjunction with, a Title III order.

The various circuits, in concluding that orders authorizing a pen register may be issued outside of the strict controls of Title III, base their conclusion on (1) the definition of "intercept" contained in the statute, (2) a passing reference to pen registers in the legislative history, and (3) a statement of Mr. Justice Powell in his concurring and dissenting decision in *United States* v. *Giordano, supra*, which referred to pen registers.

Respondent respectfully submits that the grounds relied upon for concluding that pen registers are not covered by Title III are not convincing when compared to the legislative intent set forth above. The first, and perhaps the strongest, ground cited is the definition of "intercept" contained in the Act. 18 U.S.C. § 2510(4) provides:

> "(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

The circuit courts below reasoned that the inclusion of the word "aural" requires that the contents of the conversation actually be overheard before an "intercept" takes place. Respondent submits that this is not controlling when the Act is examined as a whole. As stated previously, the use of a pen register was considered an "interception" prior to the enactment of Title III. Congress, in its statement of legislative intent quoted above, indicated that Title III was to govern all interceptions. Without a clearer expression of Congressional intent than the use of the word "aural," it is extremely doubtful that Congress meant to exclude pen registers, particularly in view of the law governing pen registers at the time Title III was enacted. It is hard to believe that Congress through the use of this one word meant to emasculate the prohibition against the disclosure of the *existence* of a telephone call previously afforded by § 605.

The courts below also rely on the following cryptic statement from the legislative history of Title III:

> "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register', for example, would be permissible. But see *U.S.* v. *Dote*, 371 F.2d 176 (7th Cir. 1966)." S. Rep. No. 1097 90th Cong. 2nd Sess., 90 (1968)

A reading of *U.S.* v. *Dote*, casts doubt that this language indicated Congress intended law enforcement officials to be able to obtain authorization for the use of pen registers outside of Title III.

In *Dote*, a telephone company informed the Internal Revenue Service that it suspected a certain telephone was being used for bookmaking and, at the request of the IRS,

installed a pen register. The company turned over to the IRS the results of the pen register without having been served with a subpoena or other judicial process. The Court held that, while pen registers serve an important function in telephone company internal operations, and, therefore, their use was permissible, the release of the pen register results in that case without a subpoena was a violation of § 605 of the Communications Act (47 U.S.C. § 605). Thus, the statement in the legislative history that a pen register would be permissible, with the warning that the holding of *Dote* should be noted, would indicate that Congress was aware telephone companies used pen registers in the ordinary course of business, and recognized that they could continue to do so, as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the *Dote* case. Such an interpretation is clearly more consistent with the overall thrust of Title III than one that implies that Congress intended to authorize law enforcement agencies to use pen registers for investigative purposes outside of the strict requirements set forth in Title III.

The last item relied on by the courts below is the statement, clearly a dictum, of Mr. Justice Powell in *United States* v. *Giordano, supra,* in which he stated:

> "Because a pen register is not subject to the provisions of Title III the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." (416 U.S., pp. 553-554)

With all due respect to Justice Powell this dictum (since the authorization of a pen register outside of Title III was not at issue), should not be persuasive, particularly in view of the Congressional intent as set forth above, and especially now that pen registers demonstrably have full wiretap capability, a fact of which the honorable justice may not have been apprised.

Respondent submits that at best it is unclear whether Congress, by the enactment of Title III, intended to exclude the use of pen registers by law enforcement from its provisions. Given the fact that a pen register clearly reveals the existence of a call, which was prohibited prior to the enactment of Title III, and given the great potential for abuse by turning a pen register into a full scale wiretap simply by plugging in a set of head phones,* Respondent believes that Congress did not intend to exempt pen registers from the safeguards of Title III when used for law enforcement purposes.

Conclusion

For the reasons set forth herein, Respondent submits that the Petition for Certiorari should be granted and this court should determine not only whether a district court can direct an unwilling third party to affirmatively assist in placing a pen register, but also whether a district court may authorize the use of a pen register outside of the statutory safeguards contained in Title III inasmuch as that is the necessary foundation for exercise of the alleged ancillary authority to direct assistance.

Respectfully submitted,

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* In calling the Court's attention to the potential for abuse, we do not mean to ourselves make any accusation of lack of good faith or misconduct against law enforcement officials. We only want to assure that the Court has full knowledge of the facts. Congress was unwilling to grant authority for wiretapping except in the limited circumstances and under the strict safeguards set forth in Title III, and yet a clear potential for circumvention exists if pen register and leased facility orders can be secured outside it. As Madison wrote in The Federalist, "If angels were to govern men, neither external nor internal controls would be necessary." James Madison, The Federalist No. 51 (1788).

APPENDIX

"Title III"

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or randum monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforce-

ment officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to

obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications,

and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or

manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions

on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper

performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the

contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the

nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or ar · leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

[*See main volume for text of (a) to (c)*]

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer

than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8). (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal

provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. Recovery of civil damages authorized

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.